Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

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LARRY, RANDALL and MARSHALL MELTON,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

****

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

****

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51 pp

QUESTION PRESENTED FOR REVIEW[1]

Remarkably, there exists among the federal appellate courts a conflict regarding the nature and constitutional classification of the federal income tax, with some of these courts declaring this tax to be a direct property tax and others claiming that it is an excise tax. Does this conflict and uncertainty of the law create a due process violation which requires the vacation of the convictions of the Meltons for federal income tax crimes?

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[1] The style of this case as shown on the front cover of this Petition contains the names of all parties to this cause.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Larry, Randall and Marshall Melton (the "Meltons") hereby petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Court of Appeals, affirming the criminal convictions of the Meltons in the United States District Court for the Western District of North Carolina, was entered on May 22, 1996; see *United States v. Larry R. Melton, Marshall R. Melton, and Randall W. Melton,* _____ F.3d _____ (4th Cir. 1996). The unpublished opinion of the Court of Appeals appears in the Appendix hereto at -1-.

JURISDICTION

The district court's jurisdiction for this case was premised upon 18 U.S.C., §3231, since it was a criminal action filed by the United States. The jurisdiction for the court of appeals was predicated upon 28 U.S.C., §1291.

The judgment sought to be reviewed by this Petition was entered in the United States Court of Appeals for the Fourth Circuit on May 22, 1996. The jurisdiction of this Court regarding this Petition is established pursuant to 28 U.S.C., §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Art. 1, §8, cl. 1:

> "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

United States Constitution, Art. 1, §2, cl. 3:

> "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers..."

United States Constitution, Art. 1, §9, cl. 4:

> "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken."

United States Constitution, 16th Amendment:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

STATEMENT OF THE CASE

On April 7, 1993, a federal grand jury sitting in the Western District of North Carolina returned a 23 count indictment against Larry, Randall and Marshall Melton. The first count charged each of the Meltons with having violated 18 U.S.C., §371, by engaging in a conspiracy to impede the Internal Revenue Service in the performance of its tax functions. The remaining counts alternatively charged each of the Meltons with violations of 26 U.S.C., §7201 (income tax evasion) and §7203 (willful failure to file federal income tax returns), encompassing the years 1986 through 1989. Jurisdiction of the district court for this case was established pursuant to 18 U.S.C., §3231. The Meltons were arraigned on April 19, 1993, and pleas of not guilty were entered on their behalf.

Trial of this case commenced on September 8, 1993, and lasted for 8 days. During the prosecution's case, evidence was offered that Larry and Marshall Melton quit filing federal income tax returns in 1984 and Randall Melton quit filing those returns in 1988. Further, the prosecution offered evidence that the Meltons, who are house painters by profession, had formed an offshore corporation which was used by them to conceal from the Internal Revenue Service their sources and amounts of income. By failing to file federal income tax returns and through use of this foreign corporation as well as by committing acts such as placing property in the names of relatives to avoid the collection of taxes, the prosecution's case for conspiracy, willful failure to file income tax returns and tax evasion was established.

To demonstrate a lack of the requisite criminal intent and their good faith, the Meltons utilized the defense of detrimental reliance upon decisions of the

courts, a defense recognized by cases such as *United States v. Albertini*, 830 F.2d 985 (9th Cir. 1987). The Meltons testified during trial that in the early eighties, they started attending certain meetings where the constitutional foundation for the federal income tax and the relevant judicial decisions respecting it were studied. They reviewed at these meetings *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which held the 1894 federal income tax act unconstitutional. They learned that in 1913 the 16th Amendment to the U.S. Constitution was ratified and its meaning was shortly thereafter clarified by *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916). After study and discussion of the opinion in *Brushaber*, the Meltons came to believe that in a constitutional sense, the federal income tax was an indirect, excise tax. To learn what was an excise tax, they studied *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911), and particularly the definition of an excise tax given therein:

> "Excise taxes are those laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges."

Concluding that the only natural individuals who might be subject to the federal income tax were those who pursued licensed occupations, the Meltons came to believe that they were not required to file federal income tax returns because they needed no license to paint houses.[2]

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[2] See *Priddy v. City of Tulsa*, 882 P.2d 81 (OKl.Cr. 1994); and *Howard v. Lebby*, 197 Ky. 324, 246 S.W. 828 (1923).

To buttress their good faith beliefs in this respect, the Meltons called to testify in their defense Dean Allen, the man who had taught them these beliefs about the federal income tax. Allen confirmed that he had indeed instructed the Meltons that in a constitutional sense the federal income tax was an excise, and that an excise tax was defined in the above manner pursuant to *Flint*. On cross-examination, the prosecution attacked Allen's assertion that the federal income tax was an excise tax and contended that he was in error because this tax was really a direct property tax for which the 16th Amendment had eliminated any requirement that it be apportioned in accordance with the commands of the Constitution. Thus in front of the jury, the very foundation of the Meltons' beliefs was attacked as being completely wrong. The problem, however, is that federal decisional authorities support both Allen's and the prosecution's positions and thus the constitutional foundation for this tax is uncertain.

At the conclusion of all the testimony, the defense moved for judgment of acquittal. To clarify the position of the prosecution, the defense asked the prosecutors to confirm their contention that the federal income tax was in a constitutional sense a direct property tax, and the they answered in the affirmative. Based upon that reply, the defense then argued to the district court in support of the Meltons' motion that because American courts, state as well as federal, had classified this tax as both a direct tax and an indirect excise tax, the judiciary of this country had failed to reach agreement about such an important and fundamental matter as the nature of the income tax. As a consequence of these conflicting and diametrically opposing opinions regarding the constitutional classification of the federal income tax,

these laws were so unclear and uncertain that prosecution of the Meltons violated due process. The district court denied this motion and a similar one filed post-trial.

The Meltons were sentenced on June 24, 1994. They moved the district court to grant them bond on appeal and that motion was granted. Thereafter, the Meltons filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit. That court's jurisdiction was obtained via 28 U.S.C., §1291.

On appeal, the Meltons outlined this conflict of authority within the circuits. They noted that the Fourth and Sixth Circuits have decided that the federal income tax is an excise tax; but in contrast, the majority of the other circuits which have considered this question hold that this tax is a direct property tax and the 16th Amendment merely eliminated any requirement for apportionment of this particular direct tax. Clearly, a classic conflict currently exists within the circuits regarding just the simple issue of what is the constitutional classification for the federal income tax, as surprising as this may seem today.

Pursuant to the Fourth Circuit's decision in *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974), and its progeny, the Meltons argued that just this simple conflict within the circuits created uncertainty of the law which entitled them to verdict in their favor. But further, they argued that as a consequence of this conflict, other and more subtle due process violations became apparent. A direct tax and an excise tax have mutually exclusive subjects or objects, and generally the former falls upon property while the latter does not. Neither tax may have the same object. If generically both classes of these federal taxes have nothing in common regarding their objects, how can income be the object of both a direct

and excise tax? Finally, what constitutes property for federal purposes is a matter governed by state law and many states have already determined that income is not property. Under these circumstances and if this tax is imposed on property known as income, how does this federal property tax apply to something which is not property under state law? This conflict among the circuits thus creates uncertainty regarding the object of this tax, whether it is property or not.

The Meltons sought in the court of appeals reversal of their convictions, but in the unpublished opinion the Fourth Circuit affirmed them. The precedence within that circuit had previously concluded that the federal income tax is an excise tax, and this opinion continued that view even though other circuits hold the exact opposite. Rather than resolve the conflict in case authority regarding the constitutional classification of this tax, this opinion continued it and there still exists today the split in decisional authority noted above and discussed below.

As to the contention that uncertainty of the law exists because a direct tax and an excise have mutually exclusive objects, the court of appeals ignored this problem and simply decided that the failure of the federal appellate courts to reach agreement as to the constitutional classification of this tax has no legal significance and does not create a due process problem.

For the reason that the United States Court of Appeals for the Fourth Circuit has rendered an opinion in serious conflict with the decisions of other federal appellate courts, review of that decision by this Court via this petition should be granted.

REASONS FOR GRANTING THE WRIT

Since its modern inception, the federal income tax statutes have been extremely complex and difficult for the common, ordinary American to understand. During the 1913 Congressional debates on the first income tax act adopted after the 16th Amendment, Senator Elihu Root commented about the complexity of that first law:

> "I guess you will have to go to jail. If that is the result of not understanding the Income Tax Law I shall meet you there. We shall have a merry, merry time, for all of our friends will be there. It will be an intellectual center, for no one understands the Income Tax Law except persons who have not sufficient intelligence to understand the questions that arise under it."[3]

Apparently, nothing has changed since then; clearly, the complexity of this law has grown worse.

But is the constitutional foundation which supports the tremendous statutory superstructure built on top equally as complex and uncertain? The U.S. Constitution authorizes two great classes of taxes which Congress may impose, direct and indirect (see Art. 1, §2, cl. 3, and Art. 1, §9, cl. 4, for direct taxes; and Art. 1, §8, cl. 1, for the indirect taxes of excises, duties and imposts). Theoretically, these classes have mutually exclusive objects, and the object of a direct tax simply is not the object of an indirect tax. Stated differently, a single object cannot be the subject of both a direct tax and an

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[3] See The United States Tax Court: An Historical Analysis, p. 12, by Harold Dubroff. Published by CCH.

indirect tax. The Constitution also dictates the rules by which these two great classes of taxes may be imposed: direct taxes must be apportioned and indirect taxes must be geographically uniform. If a direct tax is imposed without apportionment, it is unconstitutional. If an indirect tax is imposed without uniformity, likewise it is unconstitutional.

Any particular federal tax must fit within one of these two constitutional tax classes and once the class is known, it may be determined whether any given tax complies with the constitutional regulation for imposition of that type of tax. A direct federal tax which is uniformly imposed would still be unconstitutional as one imposed in the absence of apportionment. An indirect federal tax imposed via apportionment would likewise be unconstitutional since it would not be uniform. But if it is impossible to determine which class any given tax falls within, then it is likewise impossible to determine which constitutional regulation, if any, applies to that tax. If as shown hereafter, the courts of this nation amazingly hold that an income tax is both an excise tax and a direct one, it cannot with any degree of certainty be determined which constitutional restrictions might or might not apply to the federal income tax or what is even the meaning of the 16th Amendment. Moreover, it cannot be determine what is income, whether property or non-property.

Principles of due process mandate that nobody can be criminally prosecuted for violating an unclear and confusing law.[4] Here, when the Meltons started their

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[4] See *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974); *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(a prosecution for violating an unclear legal duty abridges principles of due process); *United States v.*

effort to discharge their civic duty to learn and know the law, they had two avenues of study available to them. First, they could have started their endeavor by studying the constitutional foundation of the federal income tax. Or they could have pursued the second avenue, which would require them to study the incredibly complex federal tax code itself.[5] Like many other Americans, these house painters chose the former approach.

But upon deciding to pursue the constitutional approach, little did they understand that even this route to learning the law would result in confusion. Believing in the principle of stare decisis, they read *Brushaber* and concluded that there could be no disagreement among the courts regarding the nature and constitutional classification of the income tax, and that this tax was in fact an excise. After reaching this conclusion, their

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Garber, 607 F.2d 92, 97-98 (5th Cir. 1979); *United States v. Dahlstrom*, 713 F.2d 1423, 1429 (9th Cir. 1983); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991); *United States v. Insco*, 496 F.2d 204 (5th Cir. 1974); *People v. Dempster*, 396 Mich. 700, 242 N.W.2d 381 (1976); *United States v. Anzalone*, 766 F.2d 676, 681-82 (1st Cir. 1985); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Varbel*, 780 F.2d 758, 762 (9th Cir. 1986); *United States v. Dela Espriella*, 781 F.2d 1432 (9th Cir. 1986); and *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986).

[5] Even lawyers fail to understand these laws and judicial notice has been taken of this fact; see *Bursten v. United States*, 395 F 2d 976, 981 (5th Cir. 1968)("We must note here, as a matter of judicial knowledge, that most lawyers have only scant knowledge of the tax laws").

reading of the definition of an excise found in *Flint* caused them to believe that they were not required to file income tax returns because the tax simply did not apply to them. But what would have been their beliefs if they had known at that time that the courts of this nation, state as well as federal, were in dispute among themselves over the constitutional class to which this tax belonged? The answer is obvious: they would have been confused and this meets the standard for a due process violation. In the words of the Fourth Circuit in *Critzer*, 498 F.2d, at 1162, a due process violation is present when **"co-ordinate branches of the United States Government plausibly reach directly opposing conclusions."** Here, those co-ordinate branches are the Fourth and Sixth Circuits pitted against most of the others. But this minority of the Fourth and Sixth Circuits has the support of the majority of state courts.

To understand how this confusion in decisional authorities arose requires at least a short review of the fundamental decisions concerning the federal income tax. In 1894, Congress adopted an income tax act which was declared unconstitutional in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, aff. reh., 158 U.S. 601 (1895). The *Pollock* Court found that the income tax was a direct property tax which could only be imposed if the tax was apportioned; since the 1894 tax was not apportioned, it was found unconstitutional. In an effort to circumvent this decision, the 16th Amendment was proposed by Congress in 1909 and ratified by the states in 1913. As a result, various opinions arose regarding the meaning and legal effect of the amendment. Some factions contended that the 16th Amendment simply eliminated the apportionment requirement for one specific, direct property tax known as the income tax, while others

asserted that the amendment simply withdrew it from the direct tax category and placed the income tax in the indirect, excise tax class. These competing contentions and interpretations were apparently resolved in *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916).[2] Rather than attempt a determination of what this Court held in that case, it is more important to determine what various courts have subsequently declared *Brushaber* to mean.

A little more than a week after the opinion in *Brushaber*, similar issues were present for decision in *Stanton v. Baltic Mining Co.*, 240 U.S. 103, 112-13 (1916), which involved the question of whether an inadequate depletion allowance for a mining company constituted a direct tax on the company's property. As to the contention that "the 16th Amendment authorized only an exceptional direct income tax without apportionment," this Court rejected it by stating that this contention:

> "manifestly disregards the fact that by the previous ruling it was settled that the provisions of the 16th Amendment conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from

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[2] In this decision, there is a very lengthy sentence which contains the following phrase:

> "... by which alone such taxes were removed from the great class of excises, duties and imposts subject to the rule of uniformity, and were placed under the other or direct class," 240 U.S., at 19.

This phrase and the one at the very end of this paragraph are almost identical. This language was used to describe the contention this Court was rejecting, not approving.

> being taken out of the category of indirect taxation to which it inherently belonged, and being placed in the category of direct taxation."

This Court clearly held that income taxes inherently belonged to the indirect/excise tax class, but had been converted by *Pollock* to direct taxes by considering the source of the income; the 16th Amendment merely banished the rule in *Pollock*. See also *Tyee Realty Co. v. Anderson*, 240 U.S. 115 (1916), decided the same day.

However, the victory of defining what the 16th Amendment meant was short lived and later decisions commenced a course which appears to have changed the meaning of *Brushaber*, or at least provided fertile grounds for an entirely different and opposite construction of it. In *William E. Peck and Co. v. Lowe*, 247 U.S. 165, 172-73 (1918), which involved a tax imposed on export earnings, the decision seemed to indicate that what was accomplished by the amendment was the elimination of the apportionment requirement for the direct tax known as the income tax, an argument rejected in *Baltic*:

> "The Sixteenth Amendment, although referred to in argument, has no real bearing and may be put out of view. As pointed out in recent decisions, it does not extend the taxing power to new or excepted subjects, but merely removed all occasion, which otherwise might exist, for an apportionment among the states of taxes laid on income, whether it be derived from one source or another."

The drift away from the position of this Court that the income tax via the 16th Amendment fell within the

excise tax class became more pronounced with the decision in *Eisner v. Macomber*, 252 U.S. 189, 206 (1920), which involved the application of this tax to a stock dividend. Here, certain language of the opinion plainly stated what many lawyers and some judges today think was accomplished by means of this amendment, the elimination of the apportionment requirement for the direct tax known as the income tax. In reaching its decision, this Court quoted the amendment and then apparently redeclared its meaning:

> "As repeatedly held, this did not extend the taxing power to new subjects, **but merely removed the necessity which otherwise might exist for an apportionment among the states of taxes laid on income.** *Brushaber.*"
>
> "A proper regard for its genesis, as well as its very clear language, requires also that this amendment shall not be extended by loose construction, **so as to repeal or modify, except as applied to income,** those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal."

Is this the resurfacing of the argument that "the 16th Amendment authorized only an exceptional direct income tax without apportionment" condemned in *Baltic*?

From a study of *Brushaber*, it is thus possible for someone to rely upon those portions of the two phrases at the beginning and ending of those parts of the opinion at 240 U.S. at 19 to believe that "the 16th Amendment authorized only an exceptional direct income tax without

apportionment." If one fell into this error (like the Melton prosecutors), this belief would be magnified by the above highlighted portions of *Eisner*. Confusion abounds as to the correct interpretation of *Brushaber*, and this is obvious because various courts of this nation have relied upon this line of authority to reach diametrically opposing and conflicting results.

The state courts have been particularly split over the nature of an income tax and whether it constitutes a direct property tax or an indirect/excise, which is not imposed on property. A small number of them hold that an income tax is a direct property tax; see *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 58 (1920); *State v. Pinder*, 108 A. 43, 45 (Del. 1919); *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909 (1932); *Opinion of the Justices*, 220 Mass. 613, 108 N.E. 570 (1915); *Trefry v. Putnam*, 227 Mass. 522, 116 N.E. 904 (1917); *Maguire v. Tax Comm. of Commonwealth*, 230 Mass. 503, 120 N.E. 162, 166 (1918); *Hart v. Tax Comm.*, 240 Mass. 37, 132 N.E. 621 (1921); *In re Ponzi*, 6 F.2d 324 (D.Mass. 1925); *Kennedy v. Comm. of Corps. & Taxation*, 256 Mass. 426, 152 N.E. 747 (1926); *In re Opinion of the Justices*, 266 Mass. 583, 165 N.E. 900, 902 (1929); *Hutchins v. Comm. of Corps. & Taxation*, 272 Mass. 422, 172 N.E. 605, 608 (1930); *Bryant v. Comm. of Corps. & Tax'n.*, 291 Mass. 498, 197 N.E. 509 (1935); *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81, 82 (1933);[3] *Jensen v.*

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[3] The dissent in this case noted the wide divergence of the authority as to whether the tax is a direct property tax or an excise. It commented: "The disagreement of the courts and judges on identical problems seems to afford the highest proof that

Henneford, 185 Wash. 209, 53 P.2d 607 (1936); *State ex rel Manitowoc Gas Co. v. Wisconsin Tax Comm.*, 161 Wis. 111, 152 N.W. 848, 850 (1915); and *State ex rel Sallie F. Moon Co. v. Wisconsin Tax Comm.*, 166 Wis. 287, 163 N.W. 639, 640 (1917). A far larger number of state courts disagree with these cases and have held that an income tax is not a property tax but an excise tax instead; see *Purnell v. Page*, 133 N.C. 125, 45 S.E. 534, 535 (1903); *State v. Frear*, 148 Wis. 456, 134 N.W. 673, 692 (1912); *Opinion of Justices*, 77 N.H. 611, 93 A. 311, 313 (1915); *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196 (1918); *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4 (1921); *Stanley v. Gates*, 179 Ark. 886, 19 S.W.2d 1000, 1001 (1929); *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58 (1930); *Diefendorf v. Gallet*, 51 Idaho 619, 10 P.2d 307, 313 (1932); *O'Connell v. State Board*, 95 Mont. 91, 25 P.2d 114, 119 (1933); *Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 400 (1933); *Reed v. Bjornson*, 191 Minn. 254, 253 N.W. 102, 109 (1934); *Opinion of the Justices*, 133 Me. 525, 178 A. 621, 623 (1935); *Miles v. Dept. of Treasury*, 209 Ind. 172, 199 N.E. 372, 377 (1935)(citing *Brushaber*); *Marshall v. South Carolina Tax Comm.*, 178 S.C. 57, 182 S.E. 96, 97 (1935); *Hunton v. Commonwealth*, 166 Va. 229, 183 S.E. 873, 876 (1936); *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W.2d 251, 259 (1937); *Vilas v. Iowa State Bd. of Assess. & Review*, 223 Iowa 604, 273 N.W. 338, 342 (1937); *Oursler v. Tawes*, 178 Md. 471, 13 A.2d 763, 768 (1940); *California Co. v. State*, 141 Colo. 288, 348 P.2d 382 (1959); and *Burns v. State Bureau of Revenue*, 79 N.M. 53, 439 P.2d 702, 706 (1968).

'reasonable doubt' does exist," 25 P.2d, at 89-90.

This split of authority evident within the state cases also manifests itself in the federal appellate courts. For example, in the First Circuit it is difficult to determine the meaning of the 16th Amendment because in *United States v. Turano*, 802 F.2d 10, 12 (1st Cir. 1986), that court held that the "16th Amendment eliminated the indirect/direct distinction as applied to taxes on income." Next door in the Second Circuit, there is uncertainty revealed by three completely inconsistent cases. In *Jandorf's Estate v. Commissioner*, 171 F.2d 464, 465 (2nd Cir. 1948), that court declared, "It should be noted that estate or inheritance taxes are excises ... while surtaxes, excess profits and war-profits taxes are direct property taxes." Surtaxes are the graduated portions of the income tax, so this court holds that the personal income tax is a direct tax. But in *Ficalora v. Commissioner*, 751 F.2d 85, 87 (2nd Cir. 1984), that court stated that the personal income tax was an indirect tax: "[T]he Supreme Court explicitly stated that taxes on income from one's employment are not direct taxes and are not subject to the necessity of apportionment." But compare *United States v. Sitka*, 845 F.2d 43, 46 (2nd Cir. 1988)(citing *Parker*, infra, for the proposition that the tax is direct). In the Third Circuit, it has been held in one case that all income taxes are direct, but in another that only some are direct; see *Keasbey & Mattison Co. v. Rothensies*, 133 F.2d 894, 897 (3rd Cir. 1943)("[A]n income tax is a direct tax upon income therein defined"); and *Penn Mutual Indemnity Co. v. Commissioner*, 277 F.2d 16, 19 (3rd Cir. 1960)("*Pollock* ... only held that a tax on the income derived from real or personal property was so close to a tax on that property that it could not be imposed without apportionment. The Sixteenth Amendment removed that barrier").

In the remainder of the federal appellate courts, the difference of opinion as to whether the federal income tax is a direct or indirect tax is likewise as profound and confusing. In the Fourth and Sixth Circuits, the income tax has been held to be an excise tax; see *White Packing Co. v. Robertson*, 89 F.2d 775, 779 (4th Cir. 1937)("The tax is, of course, an excise tax, as are all taxes on income"); and *United States v. Gaumer*, 972 F.2d 723, 725 (6th Cir. 1992)("*Brushaber* and the Congressional Record excerpt do indeed state that for constitutional purposes, the income tax is an excise tax"). However, in the Fifth, Seventh, Eighth and Tenth Circuits, arguments that this tax is an excise have been rejected. For example, in *Parker v. Commissioner*, 724 F.2d 469, 471 (5th Cir. 1984), the court clearly dismissed the contention that this tax is an excise:

> "The Supreme Court promptly determined in *Brushaber* ... that the sixteenth amendment provided the needed constitutional basis for the imposition of a direct non-apportioned income tax.
>
> "The sixteenth amendment merely eliminates the requirement that the direct income tax be apportioned among the states.
>
> "The sixteenth amendment was enacted for the express purpose of providing for a direct income tax."

See also *Fairbanks v. Commissioner*, 191 F.2d 680 (9th Cir. 1951). In *Coleman v. Commissioner*, 791 F.2d 68, 70 (7th Cir. 1986), the court held that an argument that this tax was an excise was frivolous on its face ("The power

thus long predates the Sixteenth Amendment, which did no more than remove the apportionment requirement"). A similar conclusion was reached in *United States v. Francisco*, 614 F.2d 617, 619 (8th Cir. 1980), that court declaring that *Brushaber* held this tax to be a direct one:

> "The cases cited by Francisco clearly establish that **the income tax is a direct tax**, thus refuting the argument based upon his first theory. See *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1, 19, 36 S.Ct. 236, 242, 60 L.Ed. 493 (1916) (the purpose of the Sixteenth Amendment was to take the income tax 'out of the class of excises, duties and imposts and place it in the class of direct taxes')".[4]

Finally, in *United States v. Lawson*, 670 F.2d 923, 927 (10th Cir. 1982), that court expressed in the following fashion its contempt for the contention that the federal income tax is an excise:

> "Lawson's 'jurisdictional' claim, more accurately a constitutional claim, is based on an argument that the Sixteenth Amendment only authorizes excise-type taxes on income derived from activities that are government-licensed or

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[4] It is interesting to note that this federal court relied upon those portions of the *Brushaber* decision quoted previously where this Court noted the argument is was precisely rejecting. If the judges who are legal scholars are capable of completely misunderstanding this opinion, is it not also probable that the American people and even lawyers can make the same mistake?

> otherwise specially protected... The contention is totally without merit... The Sixteenth Amendment removed any need to apportion income taxes among the states that otherwise would have been required by Article I, Section 9, clause 4."

Therefore, while this Court rejected in *Baltic* the argument that "the 16th Amendment authorized only an exceptional direct income tax without apportionment," this position now prevails in the Fifth, Seventh, Eighth, Ninth and Tenth Circuits. In the Second Circuit, the existing authority illogically claims that this tax fits within both of the mutually exclusive constitutional classes of tax. But in opposition to the line of decisional authority in these circuits quoted above, the court of appeals here identified the income tax as an "indirect tax." Which line of authority is really correct?

As the above discussion shows, there is a clear dispute within not only the federal appellate courts, but also the state courts, regarding the nature and constitutional classification of the income tax. Under the Fourth Circuit's *Critzer* due process standard, this conflict exhibits a violation of due process because within a branch of government, the judiciary, its members have reached diametrically opposing results on the same issue. But the split in decisional authorities needed to demonstrate a due process violation does not require a great and profound split as that here. In *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987), only a single Tax Court case constituted the opposing authority creating the conflict. *Heller* demonstrates that a due process violation which creates an uncertainty of the law defense may be predicated upon a single inconsistent decision.

Clearly there exists within the decisions of the

American judiciary, and particularly the federal courts, a serious conflict regarding just the simple question of what is the nature and constitutional classification of an income tax. This problem was addressed by the dissenting judge in *Culliton v. Chase*, 25 P.2d at 89-90, who observed that this "disagreement of the courts and judges on identical problems seems to afford the highest proof that 'reasonable doubt' does exist." If American courts cannot decide such fundamental questions as what is the nature of the federal income tax, then it is obvious that a serious due process problem exists within the federal income tax laws. If this split in decisional authorities actually creates reasonable doubt as the *Culliton* dissent claims, then the Meltons' motion for a judgment of acquittal should have been granted, contrary to the opinion of the court of appeals.

But further, this conflict within the courts over the nature of the federal income tax has other and more subtle due process ramifications. A direct federal tax applies to and taxes property while an indirect excise tax is never imposed on property but usually an event such as sales; see *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929).[5] Those courts which hold that an income tax is a direct property tax believe that income is property, yet those which hold that this tax is an excise declare that income is not property. Here, there is evident a dispute

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[5] This Court defined in *Bromley* these two types of taxes in the following manner: "While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct.... a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned."

over the nature of the object of this tax and that dispute involves the apparently complicated question of whether income is property or not. If the courts of this nation cannot identify what is the nature of this ephemeral item known as income,[6] then how can the American people or even the Meltons?

The question of what constitutes property is an issue governed by state law; see *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960), and *United States v. Baldwin*, 575 F.2d 1097, 1098 (4th Cir. 1978). The definition of the term, "property," is very broad; see *Samet v. Farmers' & Merchants' Nat. Bank*, 247 F. 669, 671 (4th Cir. 1917)("Property is .... everything that has exchangeable value or goes to make up a man's wealth"). It includes money, credits, evidences of debt, and choses in action; see *State v. Ward*, 222 N.C. 316, 22 S.E.2d 922, 925 (1942). Income is property according to *St. Louis Union Trust Co. v. United States*, 617 F.2d 1293, 1301 (8th Cir. 1980). Accrued wages and salaries are likewise property; see *Sims v. United States*, 252 F.2d 434, 437 (4th Cir. 1958), aff'd., 359 U.S. 108 (1959); and *Kolb v. Berlin*, 356 F.2d 269, 271 (5th Cir. 1966). Accounts receivable are property; see *In re Ralar Distributors, Inc.*, 4 F.3d 62, 67 (1st Cir. 1993). Even private employment and a profession are considered property; see *United States v. Briggs*, 514 F.2d 794, 798 (5th Cir. 1975). However, in a number of states, income has already been determined not to be property.

There appears to be no dispute about the plain

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[6] At least one court has declared that the term "income" is not defined in the Internal Revenue Code; see *United States v. Ballard*, 535 F.2d 400, 404 (8th Cir. 1976).

requirements of the U.S. Constitution that direct property taxes must be apportioned and that indirect taxes must be uniform. Likewise as shown above, there is a line of decisional authority regarding the generally accepted proposition that income is property, although there are courts which deny this. In *James v. United States*, 970 F.2d 750, 755, 756 n. 11 (10th Cir. 1992), the Tenth Circuit made it clear that income is property. Pursuant to *United States v. Lawson*, supra, the Tenth Circuit declares that the property known as income is subject to the federal income tax under the view that the 16th Amendment eliminated the apportionment requirement for a specific class of property known as income. However, there is ample contrary judicial authority which demonstrates that this construction of the 16th Amendment is erroneous and that the purpose, intent and meaning of the amendment was to define the federal income tax as an excise. In fact, this was the conclusion of the court of appeals in the case of the Meltons. An error in a logical argument involving a single premise affects the ultimate conclusion. If the Tenth Circuit accepted the proposition that this tax was really an excise like the court of appeals did here, but adhered to its decision in *James*, would not a valid legal argument logically follow that property known as income could not be taxed via this federal excise tax which is not imposed on property?

This same problem, but from an opposite perspective, is evident within the Fourth Circuit where the existing authority of *Sims v. United States*, supra, declares that income is property. Since that Circuit holds that the federal income tax is an excise via *White Packing Co. v. Robertson*, supra, and since the definition of an excise tax appearing in that Court's opinion in *New*

Neighborhoods, Inc. v. West Virginia Workers' Comp. Fund, 886 F.2d 714, 719 (4th Cir. 1989), excludes a tax on property, does it not logically follow that there is a tremendous gap in the decisional authority within the Fourth Circuit which presents a view of the law that the property known as income might not be taxed? Based on these cases, is this tax clearly imposed and its object or subject clearly defined?

Review of the above noted authority in other circuits and States only demonstrates how profound this problem is. In the Sixth Circuit, *United States v. Gaumer*, supra, declares the income tax to be an excise; via *Jack Cole Co. v. MacFarland*, 337 S.W.2d 453, 455-56 (Tenn. 1960), the Tennessee Supreme Court has held that an excise tax cannot be used to tax the right to earn a living. Which authority do the people living in Tennessee follow? If they follow the word of their own state court, they might be charged with a tax crime, yet they have a right to rely upon the word of the courts, even when erroneous; see *United States v. Albertini*, 830 F.2d 985, 989 (9th Cir. 1987). A different problem emerges in the Eighth Circuit where *United States v. Francisco*, supra, holds that an income tax is a direct property tax. Missouri is within that circuit, but the Missouri Supreme Court held in *Ludlow-Saylor Wire Co. v. Wollbrinck*, supra, that an income tax is an excise; if income is not property under Missouri state law,[7] then how does this

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[7] The Court in *Ludlow*, 205 S.W. at 198, declared that income is not property: "It is apparent therefore, that when the Constitution of 1875 was adopted, the word 'property' as the basis for taxation, proportioned to value, had acquired a fixed and definite meaning preclusive of personal incomes, occupations, privileges

federal property tax operate as to this "non-property"? Iowa is also in the Eighth Circuit, but in *Hale v. Iowa State Board of Assessment and Review*, 223 Iowa 321, 271 N.W. 168, 172 (1937), that court held that "income is not property within the law of taxation." If controlling state law holds that income is not property yet the federal appellate court for the same state holds the exact opposite and declares that the federal income tax is a property tax imposed on property known as income, is not a serious uncertainty of the law, due process problem clearly evident?

How about the inherent conflict in judicial opinions between the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court of Idaho? In *Diefendorf v. Gallet*, supra, it was held that income is not property: "[W]e have reached the independent conclusion that income is not property for the purposes of taxation under the provisions of our Constitution." Thus under the controlling law of Idaho, income is not property. However, the Ninth Circuit has concluded that the federal income tax is imposed on some form of property known as "income;" see *Fairbanks v. Commissioner*, supra. If the federal income tax is a property tax, yet under the controlling law of Idaho income is not property, precisely what does the federal income tax fall upon and have as its object in Idaho? This question is one that no Idaho court can resolve.

The decisional authority within the Fifth Circuit, *Parker v. Commissioner*, supra, holds that this tax is a direct property tax, but a contrary view prevails in Mississippi where its citizens are told that an income tax is an excise; see *Hattiesburg Grocery Co. v. Robertson*, supra. The courts in Wisconsin and Indiana, via *State v.*

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and similar sources of revenue."

Frear, and *Miles v. Dept. of Treasury*, supra, have found this tax to be an excise, yet the federal appellate court which encompasses these two states has an entirely different view of the object of the tax; see *Coleman v. Commissioner*, supra. The Tenth Circuit, which sits in Denver, held in *Lawson*, supra, that the income tax is a property tax, yet a state court in the same city has declared that such a tax is an excise; see *California Co. v. State*, supra.

In Alabama, income is property via *Eliasberg Bros. Mercantile Co. v. Grimes*, supra; but next door in Georgia via *Featherstone v. Norman*,[8] supra, it is not. While the Eleventh Circuit appears not as yet to have passed upon the question of what type of tax the federal income tax is, consulting decisions of this Court still doesn't resolve the question. By following the rationale of *Brushaber* and *Bromley*, which declare the federal income tax to be an excise tax which is not imposed on property, are the people of Alabama exempt from this tax while those in Georgia are not? But by reversing the choice of which decisions of this Court to follow in an effort to resolve this controversy merely changes the results but not the problem. By following *Eisner* which seems to hold that this tax is imposed on property, do the people of Alabama owe this tax while those in Georgia do not?

These differing and conflicting conclusions plainly reveal a serious uncertainty about what is taxed, and the Meltons do not attempt herein to offer any explanation for all of this inconsistency; the fact of the matter is

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[8] See 153 S.E. at 65: "Hence a man's income is not 'property' within the meaning of a constitutional requirement that taxes shall be laid equally and uniformly upon all property within the State."

that they cannot other than to contend that this uncertainty of the law creates a serious due process violation. This problem was created by a multitude of different state and federal court decisions and therefore is beyond the power of any single state or federal appellate court to resolve. The only court which appears capable of resolving all of these problems is this one.

But this is not the only fundamental problem for the federal income tax. Additionally, the question of which statute controls the duty to file income tax returns is subject to judicial dispute. In *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 222 (1944), this Court noted that §54 of the 1939 Internal Revenue Code, the predecessor for Internal Revenue Code §6001, governed the requirement to file federal income tax returns; see also *Updike v. United States*, 8 F.2d 913, 915 (8th Cir. 1925). In *True v. United States*, 354 F.2d 323, 324 (Ct.Cl. 1965), *United States v. Carlson*, 260 F.Supp. 423, 425 (E.D.N.Y. 1966), *White v. Commissioner*, 72 U.S.T.C. 1126, 1129 (1979), *McCaskill v. Commissioner*, 77 U.S.T.C. 689, 698 (1981), *Counts v. Commissioner*, 774 F.2d 426, 427 (11th Cir. 1985), *Blount v. Commissioner*, 86 U.S.T.C. 383, 386 (1986), and *Beard v. Commissioner*, 793 F.2d 139 (6th Cir. 1986), these courts held that Internal Revenue Code §6011 related to the filing requirement. In *United States v. Moore*, 627 F.2d 830, 834 (7th Cir. 1980), *United States v. Dawes*, 951 F.2d 1189, 1192, n. 3 (10th Cir. 1991), and *United States v. Hicks*, 947 F.2d 1356, 1360 (9th Cir. 1991), those courts held that Internal Revenue Code §§ 6011 and 6012 governed this duty. In contrast, the cases of *Steinbrecher v. Commissioner*, 712 F.2d 195, 198 (5th Cir. 1983), *United States v. Bowers*, 920 F.2d 220, 222 (4th Cir. 1990), and *United States v. Neff*, 954 F.2d 698, 699 (11th Cir. 1992), held that only §6012 controlled this

duty. But in *United States v. Pilcher*, 672 F.2d 875, 877 (11th Cir. 1982), none of the above sections were mentioned and it was held that 26 U.S.C., §7203, required returns to be filed. Like the cases exhibiting the conflict over what constitutional class encompasses the income tax, it is very apparent that there is even a diversity of opinion among federal judges regarding which sections of the Internal Revenue Code govern the requirement to file federal income tax returns.

In summary, any given federal tax must fall within one or the other of the two great constitutional tax classes, which have mutually exclusive objects.[9] If income is not property, it is not taxed via a direct federal tax. If it is property, it is not taxed via a federal excise tax. The 16th Amendment may have eliminated the apportionment requirement for direct property taxes, or it may not have, and this appears to still be an open and undecided question, at least among the lower courts. While many may erroneously believe that these questions about the federal income tax were settled long ago, the truth of the matter is that they have not.

Today, a multitude of opinions exist regarding this supposedly well settled issue. Some federal courts assert that the federal income tax is a property tax, yet these same federal appellate courts encompass states wherein the state courts have declared that income is not property. At the opposite end of this spectrum, the Fourth Circuit claims that this is an excise tax, yet its own decisional authority has already found that income is property. Perhaps Senator Elihu Root's words were

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[9] While no single subject of taxation may fall within both classes, there appears to be an exception to this rule for the income tax.

timeless and immortal and we will never be able to make sense from all of this conflict. But then again, perhaps we can, but that solution will depend upon this Court's action in granting certiorari in this case.

CONCLUSION

For the reasons expressed above, this Court should hear this case and grant certiorari.

Respectfully submitted,

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Counsel of Record for the
Melton brothers, Larry,
Randall and Marshall
Melton,
Petitioners.

APPENDIX:

The Opinion of the United States Court
of Appeals for the Fourth Circuit in

United States of America,

v.

Larry R. Melton,
Marshall R. Melton,
Randall W. Melton.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	No. 94-5535
LARRY R. MELTON; MARSHALL R. MELTON; RANDALL W. MELTON,	)	
Defendants-Appellants.	)	

Appeal from the United States District Court
for the Western District of North Carolina, at Shelby.
Graham C. Mullen, District Judge.
(CR-93-34)

Argued: March 8, 1996

Decided: May 22, 1996

Before MURNAGHAN and MOTZ, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Lowell Harrison Becraft, Jr., Huntsville, Alabama, for Appellants. Gregory Victor Davis, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Loretta C. Argrett, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Scott A. Schumacher, Mark T. Calloway, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants Larry R., Randall W. and Marshall R. Melton were convicted of conspiracy to defraud the federal government by concealing assets from the Internal Revenue Service, failure to pay federal income taxes and failure to file federal income tax returns. Maintaining that the United States Supreme Court case law and the federal tax code led them to believe that they were exempt from paying federal income taxes, they have argued that they lacked the requisite criminal intent to violate the law. They have also contended that their convictions cannot be sustained due to uncertainty in the law surrounding the federal income tax. Because we find that their claims lack merit, we affirm the judgment of

the district court.

I.

In September 1993, the Meltons were tried before a jury in the United States District Court for the Western District of North Carolina on twenty-three charges of tax-related criminal activity. The United States alleged that, during the years 1986 through 1989, the three brothers had engaged in a conspiracy to impede the Internal Revenue Service in the performance of its functions of "ascertainment, computation, assessment and collection of" their federal income taxes in violation of 18 U.S.C. §371, had evaded taxes in violation of 26 U.S.C. §7201, and had failed to file returns in violation of 26 U.S.C. §7203. The United States presented evidence that the Meltons used their painting partnership, Melton Brothers Painting, and a foreign corporation they controlled, Kimbro Quality Investments, to conduct business in ways designed to hide assets from the IRS. The United States argued that the brothers purchased Kimbro in 1987 and structured their ownership so that their names were not connected with the corporation, that they conducted nearly all of their business in cash and that they purchased gold, silver and rare coins -- all with the purpose of concealing the amounts and sources of their income from the IRS.[1] IRS agents testified that the Meltons had structured their transactions in ways that would bypass banks, leave no paper trails and prevent the IRS from computing their taxable income.

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[1] Larry also was accused of hiding his ownership of real property by placing it in his relatives' names.

Records introduced at trial indicated that each brother had filed income tax returns and paid income taxes through 1983. Larry and Marshall did not file returns for any year thereafter.[2] Randall continued to file returns through 1987, but not any year thereafter. In addition, Randall failed to report all of his income for the years 1985, 1986 and 1987. The United States demonstrated that each Melton brother earned more than the minimum amount of income required for the filing of a return in each of the years at issue. In all, the government proved that Larry owed $35,787 in taxes, Marshall owed $36,062, and Randall owed $39,333. There was proof that the Meltons were aware of their income and of their tax liability.[3]

The Meltons apparently learned how to operate "outside the system" at tax protestor meetings and lectures they attended in the 1980s. At those meetings, a man named Dean Allen often spoke about the federal income tax, advising that it was an excise tax that could not lawfully be imposed on common law occupations. The Meltons testified at trial that, based on Allen's lectures and their independent research, they concluded that, as painters engaged in a common law occupation, they could not be subjected to an excise tax denominated as an income tax. Following the United States's presentation of

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[2] They also owed additional taxes, penalties and interest for 1982 and 1983.

[3] At least two brothers represented their income as $2,500 per month on a loan application, and all of the Meltons received considerable correspondence from the IRS.

evidence, the brothers moved for acquittal because of conflicts in the law, but the judge denied their motion.

The jury returned guilty verdicts on twenty-one counts alleged in the indictment.[4] The district court sentenced Larry to 33 months in prison, Marshall to 18 months in prison, and Randall to 15 months in prison, with supervised release afterward for each. The brothers timely appealed their convictions and sentences.

II.

The Meltons have contended that the law requiring them to pay taxes and file returns is unclear. They have argued that they were misled into believing that they owed no federal income tax and that they were convicted in violation of due process, all because of the vagueness and uncertainty over the nature of the federal income tax and the statutory duty to file returns. Neither the district court nor the jury accepted the Meltons' arguments. Nor do we.

We consider *de novo*, as a question of law, whether the law is sufficiently certain to permit a conviction. *United States v. Mallas*, 762 F.2d 361, 364 n. 4 (4th Cir. 1985); *accord United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987), *cert. denied*, 498 U.S. 813 (1990). In reviewing the district court's denial of a motion for judgment of acquittal, we must determine "whether there is substantial evidence (direct or circumstantial) which,

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[4] The jury found the Meltons guilty of all counts except two charging Randall with tax evasion for the years 1986 and 1987.

taken in the light most favorable to the government, would warrant a jury finding that the defendant was guilty beyond a reasonable doubt." *United States v. MacCloskey*, 682 F.2d 468, 473 (4th Cir. 1982); *see also Glasser v. United States*, 315 U.S. 60, 80 (1942).

The Meltons maintain that they relied on federal case law and other materials to determine that they were not required to file federal income tax returns. They claim that they read a notice issued by the IRS[5] which led them to the Internal Revenue Code, 26 U.S.C. §1 *et seq.* There, sections 6001 and 6011 explained that only "persons liable" must pay income taxes. The Meltons claim that, from Supreme Court cases and other documents, they learned that the income tax is an excise tax for which, as housepainters, they could not be held liable.

While courts may have offered differing views of the income tax over time, the United States Supreme Court has consistently interpreted the federal income tax for 80 years. Since 1916, the Court has construed the tax

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[5] IRS Notice 609 states in pertinent part:

> Our legal right to ask for information is Internal Revenue Code sections 6001 and 6011 and their regulations. They say that you must file a return or statement with us for any tax you are liable for... If you do not file a return, do not provide the information we ask for, or provide fraudulent information, the law provides that you may be charged penalties and, in certain cases, you may be subject to criminal prosecution.

as an indirect tax authorized under Article I, Section 8, Clause I of the U.S. Constitution, as amended by the Sixteenth Amendment. *See Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1, 11, 16-19 (1916). Federal courts have all agreed that wages or compensation for services constitute income and that individuals receiving income are subject to the federal income tax -- regardless of its nature. *See, e.g., Brushaber*, 240 U.S. at 17; *United States v. Sloan*, 939 F.2d 499, 500-01 (7th Cir. 1991), *cert. denied*, 502 U.S. 1060 (1992); *Simmons v. United States*, 308 F.2d 160, 176-68 (4th Cir. 1962). In short, the debate over whether the income tax is an excise tax or a direct tax is irrelevant to the obligation of citizens to pay taxes and file returns. *Simmons*, 308 F.2d at 166 n.21 (stating that "it has been clearly established that the labels used do not determine the extent of the taxing power").

Furthermore, the duty to file returns and pay income taxes is clear. Section 1 of the Internal Revenue Code imposes a federal tax on the taxable income of every individual. 26 U.S.C. §1. Section 63 defines "taxable income" as gross income minus allowable deductions. 26 U.S.C. §63. Section 61 states that "gross income means all income from whatever source derived," including compensation for services. 26 U.S.C. §61. Sections 6001 and 6011 provide that a person must keep records and file a tax return for any tax for which he is liable. 26 U.S.C. §§ 6001 & 6011. Finally, section 6012 provides that every individual having gross income that equals or exceeds the exemption amount in a taxable year shall file an income tax return. 26 U.S.C. §6012. The duty to pay federal income taxes therefore is "manifest on the face of the statutes, without any resort to IRS rules, forms or regulations." *United States v. Bowers*, 920 F.2d

220, 222 (4th Cir. 1990). The rarely recognized proposition that, "where the law is vague or highly debatable, a defendant -- actually or imputedly -- lacks the requisite intent to violate it, " *Mallas*, 762 F.2d at 363 (quoting *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974)), simply does not apply here.

Because federal income tax laws are clear, the case against the Meltons was properly presented to the jury. *Cheek v. United States*, 498 U.S. 192, 203 (1991). The jury heard not only the United States's evidence against the Meltons, but also the brothers' defense that they believed they were not "persons liable" for the federal income tax. The jury rejected the excuse, however, and convicted them on nearly all counts. The record contains sufficient evidence to support the jury's finding that the Meltons were aware of their duties under the income tax laws and wilfully chose to disobey those laws in an attempt to evade their taxes.[6]

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[6] There is no evidence that the Meltons received misinformation from the federal government regarding their obligation to pay income taxes. The Internal Revenue Code clearly defines who is liable to pay income taxes and required to file returns. Each Melton brother had gross income in excess of the amount requiring the filing of a return in each of the years at issue. Therefore, each was a "person liable." Furthermore, each brother had filed income tax returns in the past. At best, the evidence shows that the Meltons "may have been misguided, but they were certainty not unwary." *Bowers*, 920 F.2d at 223.

III.

The Meltons also challenge the district court's refusal to give various jury instructions that they had proposed. We review the decisions for abuse of discretion. *United States v. Russell*, 971 F.2d 1098, 1107 (4th Cir. 1992), *cert. denied*, 506 U.S. 1066 (1993); *United States v. Lozano*, 839 F.2d 1020, 1024 (4th Cir. 1988). A district court has discretion to choose among proposed instructions and to determine the content of its charge to the jury, *Russell*, 971 F.2d at 1107, as long as, when "viewed as a whole in the context of the trial, the charge was not misleading and contained an adequate statement of the law to guide the jury's determination," *United States v. Park*, 421 U.S. 658, 675 (1975).

Viewing the jury instructions in the context of the entire trial, we conclude that they were proper in all respects. We therefore find no abuse of discretion.

IV.

For the foregoing reasons, the convictions and sentences are

AFFIRMED.